In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1606

JOHN MICELI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The United States instituted this action in the United States District Court for the Northern District of Ohio to enforce an Internal Revenue Service summons. The summons directed the Cleveland Trust Company to deliver, *inter alia,* a personal financial statement submitted by petitioner in connection with a loan application. Petitioner intervened, claiming that the summons had not been issued in good faith prior to a recommendation for criminal prosecution, as required by *Donaldson* v. *United States,* 400 U.S. 517.

The district court found that the sole object of the summons was to gather data for a criminal prosecution and therefore that its issuance was not made in good faith. The district court accordingly denied enforcement of the summons. The court of appeals reviewed the record and determined that the summons was in

fact issued in the course of a good faith investigation of petitioner's civil liability and that the findings to the contrary by the district court were clearly erroneous. The court of appeals vacated the judgment of the district court and remanded for enforcement of the summons.

Petitioner here claims that the court of appeals erred in its interpretation of the facts of this case and that review by this Court is necessary to clarify the meaning of the "good faith" requirement of *Donaldson*.

2. The court of appeals correctly interpreted the facts of this case in an opinion (Pet. App. 13-16), on which we rely, and there is no need for further review of the essentially factual question of "good faith." In any event, this Court, on May 21, 1973, denied petitioner's application for a stay of the mandate of the court of appeals, and the Cleveland Trust Company thereupon delivered petitioner's personal financial statement as directed by the summons; the petition therefore appears to be moot.

Moreover, contrary to petitioner's contention, the application of the "good faith" requirement poses little difficulty in any particular case: the issue, as the court of appeals below properly noted, is simply whether the summons was issued in the course of a genuine inquiry into civil tax liability. The fact that the taxpayer in question may also be suspected of criminal violations does not affect the validity of the summons, so long as there has been no recommendation for criminal prosecution. See *Donaldson* v. *United States*, *supra*, 400 U.S. at 531-536. It is undisputed that there had been no recommendation for prosecution of peti-

tioner at the time the summons in question here was issued (Pet. App. 15). Contrary to petitioner's suggestion (Pet. 6-7), the courts of appeals are in agreement that such a summons is valid. See, *e.g.*, *United States* v. *Billingsley*, 469 F. 2d 1208 (C.A. 10); *United States* v. *National State Bank*, 454 F. 2d 1249 (C.A. 7); *United States* v. *Bell*, 448 F. 2d 40 (C.A. 9).

Petitioner's argument here rests solely on the fact that federal agents responsible for criminal investigations called the attention of the Internal Revenue Service Audit Division to petitioner's tax returns and those of the corporation in which he had interest. But as the court of appeals below properly concluded (Pet. App. 15):

> * * * we know of no reason why, if gross receipts of the corporation had been falsely understated, the fact that information was provided to the civil side of the Internal Revenue Audit Division by agents usually concerned with criminal prosecution should immunize the taxpayer corporation from investigation as to its civil liability for additional taxes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07